No. 89-1890

In The

Supreme Court of the United States

OCTOBER TERM, 1989

OWENS-CORNING FIBERGLAS CORP., *et al.*,
Petitioners,

v.

DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION BY THE DISTRICT OF COLUMBIA

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OPINION BELOW

The District of Columbia Court of Appeals opinion, A. 1a-32a, as modified on rehearing, A. 33a-34a, is reported at 572 A.2d 394.

STATEMENT

On interlocutory appeal, the District of Columbia Court of Appeals held that the District of Columbia enjoys limited immunity from its own statutes of limitations when performing public, as opposed to proprietary, functions. In

reaching that holding, the court followed its own precedent and a "general rule" of modern common law. See A. 15a, 18a & n. 20, 19a & n. 22. The court carefully examined this Court's precedent, including *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938), and *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1889), and concluded that its own holding was compatible with precedent. A. 14a-15a, 19a. Applying current common law, the court held that removal of asbestos from schools, hospitals, libraries, prisons, public housing, and other public buildings in order to protect the health of the public using those buildings is a public function. A. 26a.

1. The District of Columbia brought this civil action in December, 1984, against thirty-seven manufacturers and distributors of asbestos products whose products were installed in approximately 2400 District schools, libraries, hospitals, housing, prisons, and other public buildings. The District's suit is for damages to recover the costs of asbestos removal and other costs generated by the government's unwitting use of an inherently lethal substance.

The District's complaint alleges that, although asbestos manufacturers have long known of asbestos' insidious effects, they conspiratorially suppressed that information and deliberately misrepresented asbestos' effects on health. Alternatively, the complaint alleges that, if the manufacturers were not fully aware of asbestos' carcinogenic and toxic qualities, they were negligent in testing it; in failing to recall it when its dangers became known (or should have become known); and in omitting warnings and instructions from their products.

The asbestos manufacturers moved for partial summary judgment, asserting that the District's claims were largely

barred by two statutes of limitations, D.C. Code § 12-301 (1981) and D.C. Code § 12-310 (1981).[1]

The trial court dismissed about 80 per cent of the District's claims. Relying on *Metropolitan Railroad*, the court held that statutes of limitations apply to the District. A. 35a, 41a. According to the court, D.C. Code § 12-301 prevented the District from obtaining damages for injury caused by asbestos products installed in each public building before January 17, 1980, if the District was aware that asbestos

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[1] D.C. Code § 12-301 (1981), at the time the litigation began, provided:

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:
>
> * * *
>
> (3) for the recovery of damages for an injury to real or personal property—3 years;
>
> * * *
>
> (8) for which a limitation is not otherwise specially prescribed--3 years.
>
> * * *

D.C. Code § 12-310 (1981), at the time the complaint was filed, provided:

> (a)(1) Except as provided in subsection (b), any action—
>
> (A) to recover damages for—
>
> * * *
>
> (ii) injury to real or personal property, * * *
>
> resulting from the defective or unsafe condition of an improvement to real property and
>
> (B) for contribution or indemnity which is brought as a result of such injury * * *,
>
> shall be barred unless in the case where injury is the basis of such action, such injury occurs within the ten-year period beginning on the date the improvement was substantially completed * * *.
>
> (2) For purposes of this subsection, an improvement to real property shall be considered substantially completed when—
>
> (A) it is first used, or
>
> (B) it is first available for use after having been completed in accordance with the contract or agreement covering

(Footnote 1 continued on next page)

had been installed in that building. A. 39a. Under D.C. Code §12-310, the District could not recover damages for asbestos products installed before January 17, 1970, if the District was *un*aware that the building contained asbestos. A. 43a.

The court's holdings were issued about a month after the Council of the District of Columbia had amended both D.C. Code § 12-301 and § 12-310 and two weeks before the period of congressional review ended without congressional action.[2] The amendments extend the limitations period in § 12-301 for injuries to persons and property caused by toxic substances, including asbestos. They exclude manufacturers and suppliers from the protection of § 12-310. A. 60a-62a. They also immunize the District of Columbia from both statutes irrespective of whether the District sues in a governmental or proprietary capacity. *Id.* The amendments are expressly applicable to all actions pending in court as of July 1, 1986. *Id.*

In response to a District motion for reconsideration, the trial court held that the amending law, D.C. Law 6-202, 34 D.C. Reg. 527, 1985 (1987), could not constitutionally be applied in this litigation. A. 44a-55a. The court permitted the District to apply to the Court of Appeals for interlocutory review of its statute of limitations holdings over manufacturer objections that review should be limited to D.C. Law

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(Footnote 1 continued)

> the improvement, including any agreed changes to the contract or agreement,
>
> whichever occurs first.
>
> (b) The limitation of actions prescribed in subsection (a) shall not apply to—
>
> (1) any action based on a contract, express or implied, or
>
> (2) any action brought against the person who, at the time the defective or unsafe condition of the improvement to real property caused injury * * *, was the owner of or in actual possession or control of such real property.

[2] District of Columbia Self-Government and Governmental Reorganization Act of 1973, §602, Pub. L. 93-198, 87 Stat. 774, *as amended*, D.C. Code § 1-233(c)(1)(1987 repl.)

6-202. The Court of Appeals granted interlocutory review over similar objections.

2. The Court of Appeals held that the District of Columbia is not subject to the limitations periods specified by §§ 12-301 and -310, except when suing in a proprietary capacity. A. 1a-32a. District removal of asbestos from schools hospitals, libraries, prisons, housing, and other public buildings in order to protect the public health, the court held, is a public function: "Unquestionably, the public at large has a profound interest in the elimination of a danger so extreme and widespread." A. 26a. Because these two holdings were sufficient to reinstate all of the District's claims, the court declined to reach issues involving D.C. Law 6-202. A. 5a-6a.

The Court of Appeals explained that the District is not subject to time limits when suing to vindicate public rights. The common law doctrine of *nullum tempus occurrit regi,* in its modern form, is available to the District for the same reasons that it is available to governments generally:

> the rule expresses a legitimate public policy of preserving " 'public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to *all* governments.' "

A. 14a, *quoting Guaranty Trust Co. v. United States, supra,* 304 U.S. at 132, and *United States v. Hoar,* 26 Fed. Cas. 329, 330 (C.C. Mass. 1821)(emphasis added). The Court of Appeals stated that the policy of protecting the law giver has been "reunited with more democratic principles, for it [has been] recognized that the people, as sovereign, are entitled to immunity from government functionaries' lax prosecution of public rights." A. 14a-15a & n. 15. The contemporary formulation of the common law doctrine, the Court of Appeals wrote, is functional, adapted by courts to modern government, not "as a mere legal inheritance," A. 21a, but to serve the doctrine's underlying justification: "defense of

the public interest and public fisc from the negligence of the government's agents." *Id.*

The Court of Appeals noted that the District was not claiming to be sovereign or quasi-sovereign but to be exempt from statutes of limitations "solely in connection with public functions delegated to it * * *." A. 16a. Not only was such immunity not foreclosed by *Metropolitan Railroad,* A. 15a-16a, it was now the rule rather than the exception that "when a municipality performs a public function, it enjoys legal immunity from the running of time." A. 18a-19a & nn. 20 & 22, *citing* to decisions in nineteen jurisdictions and to 17 E. McQuillin, MUNICIPAL CORPORATIONS (1982 & 1988 supp.) § 49.06. As a result, the Court of Appeals concluded, "we * * * hold that in its municipal capacity, the District enjoys a common-law immunity" from statutes of limitations. A. 20a.

The court denied rehearing *en banc,* no judge having called for a vote on the manufacturers' petition. A. 34a.[3]

REASONS FOR DENYING THE WRIT

1. There Is No Significant Federal Interest in the Court of Appeals' Interlocutory Decision.

This Court does not generally review District of Columbia decisions that have a purely local effect and touch no federal interest: "This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *Pernell v. Southall Realty,* 416 U.S. 363, 366 (1974); *see also Griffin v. United States,* 336 U.S. 704, 716-717, 719 (1949)(principle applied to criminal cases under the D.C. Code prosecuted in the name of the United States); *Key v. Doyle,* 434 U.S. 59 (1977)(dismissing appeal, under

[3] The hearing panel amended its opinion to add a note that the opinion was restricted to the "preliminary issue of the timeliness of the suit." A. 34a. *See* discussion, below, at 13-14.

former 28 U.S.C. 1257(1), from holding that local congressional statute was unconstitutional and denying certiorari; local statute enacted by Congress but limited to the District is not a "statute of the United States").

Although the Court has noted that its deference to the Court of Appeals as "the highest court" of the District[4] is a matter of policy rather than power, *Whalen v. United States*, 445 U.S. 684, 687 (1980), there is no reason for deviating from that policy here.[5] The statutes of limitations and the District's immunities are matters of purely local law. Other jurisdictions are wholly unaffected by the Court of Appeals' holding. No nonfrivolous constitutional issues are at stake. *See, generally, Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988)(Kansas' application of its statute of limitations to claims governed by the substantive law of other states does not implicate Full Faith and Credit or Due Process Clauses). Even as a local matter, the Court of Appeals' decision has little or no relevance beyond the present litigation in light of enactment of D.C. Law 6-202.[6]

2. The Court of Appeals' Decision Is Not Foreclosed By *Metropolitan Railroad* and Is a Reasonable Expression of the District of Columbia's Common Law.

Metropolitan Railroad is not a bar to refinements in the common law.

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[4] Act of Jul. 29, 1970, Pub. L. 91-358, 84 Stat. 475, §111, D.C. Code §11-102 (1989 repl.)("The highest court of the District of Columbia is the District of Columbia Court of Appeals. * * *").

[5] In *Whalen*, the Court deviated from its normal policy because the petition's constitutional claim "cannot be separated entirely from a resolution of the question of statutory construction." 445 U.S. at 688.

[6] The Court's normal deference to Court of Appeals' constructions of local law should have added force here, where the Court of Appeals' decision originates in an interlocutory appeal; raises no federal issues; and

(Footnote 6 continued on next page)

a. In *Metropolitan Railroad,* the Court, applying its understanding of common law prevailing a century ago, held that the District would not ordinarily be immune from statutes of limitations because it lacked sovereignty. In reaching that conclusion, the Court applied the common law doctrine, *nullum tempus,*[7] as it existed a century ago. Required to entertain direct appeals from the local court on purely local questions, the Court was necessarily the final expositor of local common law.[8] When the Court decided *Metropolitan Railroad,* therefore, it examined treatises and decisions describing the common law in other jurisdictions. *See* 132 U.S. at 11. Based on its survey of prevailing nineteenth-century jurisprudence, the Court concluded that, because municipalities were not sovereign, they were not qenerally immune from statutes of limitations.

Even at the time, however, the restriction of the immunity to sovereign governments was being questioned. One of the treatises on which the Court relied noted that some jurisdictions had held that "the maxim *[n]ullum tempus occurrit regi* is not restricted in its applications to sovereignty, but that it applies to municipal corporations as trustees

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(Footnote 6 continued)

can be reviewed after final judgment. *Pennsylvania v. Ritchie,* 480 U.S. 39, 47 (1987)(normally, "finality" requirement of 28 U.S.C. 1257 (1982) is not satisfied if state courts must conduct further substantive proceedings); *Market Street R. Co. v. Railroad Commission of California,* 324 U.S. 548, 551 (1945)(same).

[7] See 10 W. Holdsworth HISTORY OF ENGLISH LAW (1938) 355.

[8] When *Metropolitan Railroad* was decided a century ago, the Court had no power to select among District of Columbia decisions. The Supreme Court of the District of Columbia was a federal court with the "same powers and jurisdiction as the circuit courts of the United States." Rev. Stat., D.C., § 760 (1875). This Court was obligated to review all circuit court and local court decisions over a specified jurisdictional amount. Rev. Stat. § 692 (1878); Rev. Stat., D.C., § 846 (1875). In 1889, the jurisdictional amount for Supreme Court of the District of Columbia cases was $5000. Act of Mar. 3, 1885, 23 Stat. 443, ch. 355. *Metropolitan Railroad* required construction of a Maryland statute. *See* 132 U.S. at 11, *construing* 1 Kilty, Laws, 1715, ch. 23.

of the rights of the public." 2 J.F. Dillon, LAW OF MUNICIPAL CORPORATIONS (1881) § 674 at 672.[9]

Aware of this precedent, the *Metropolitan Railroad* Court expressly declined to decide whether a limitations defense could be asserted against the District if it were suing in furtherance of certain governmental functions, such as control of public property for public purposes and abatement of public nuisances. *Metropolitan Railroad*, 132 U.S. at 11, *quoted* at A. 16a. *Metropolitan Railroad* thereby suggested that, while the District would not be immune from general statutes of limitations because of the District's status as a non-sovereign municipality, it might be immune when performing *functions* peculiar to government. *Id.*[10]

Protection of the public health is a quintessential government function, especially in public buildings such as schools, hospitals, libraries, prisons, and public housing.[11] The District

[9] Judge Dillon also wrote: "The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle." 2 J.F. Dillon, LAW OF MUNICIPAL CORPORATIONS (1881) § 675 at 674.

[10] The petition argues (at 15) that Congress never gave the District general immunity from statutes of limitations. That is true; it simply means that Congress was content with letting judicial interpretations fill *Metropolitan Railroad*'s gaps. The petition's citation to D.C. Code § 12-308 (1989 repl.), which gives the United States immunity from local congressional statutes of limitations, adds nothing to the argument. Congress clearly can make the United States subject to congressional statutes of limitations, *see* 28 U.S.C. 2415 (1982); *United States v. John Hancock Mutual Life Insurance Co.*, 364 U.S. 301, 306 (1960). It is therefore likely that § 12-308, was designed to safeguard the United States' ability—under all circumstances—to sue without regard to congressionally-enacted local statutes of limitations. By contrast, Congress apparently preferred to leave the District's immunity to line-drawing by the judiciary, depending on the nature of the suit. When Congress expressly wished to prevent statutes of limitations from applying to the District because the governmental activity appeared to be *proprietary*, it legislated. *See* D.C. Code §§ 7-515 and -1415 (1989 repl.)(no limitations apply to District's efforts to obtain reimbursement from railroads for District-built rail crossings).

[11] The District government has long been delegated a general duty by Congress to protect the public health in the District, Rev. Stat., D.C., § 335,

(Footnote 11 continued on next page)

here sued to remove noxious impediments to unhampered public use of public property. Government litigation to recover full use of public property falls within the ambit of the issue deliberately left open by *Metropolitan Railroad. Id.*

Given *Metropolitan Railroad*'s refusal to decide whether the District can be immune from local statutes of limitations under all circumstances, the Court of Appeals looked at modern common law developments and concluded that it would be irrational to subject the District to general statutes of limitations when the District is acting in the role peculiar to representative government—protection of the public interest. A. 21a. Since the District has been given full responsibility for protecting the public health and safety of its citizens, "to hold that legal immunity resides in the actor rather than the act would divorce the principle from its purpose. It would expose the citizenry of the District, unlike the citizens of any other United States jurisdiction, to hazard without redress." *Id.*

b. This Court recognizes that the common law is not frozen in time, but is an evolving body of law, to be adapted to changed conditions and times. *Funk v. United States,* 290

(Footnote 11 continued

D.C. Code § 4-115 (1988 repl.)("It shall be the duty of the Mayor * * * at all times of the day or night * * * (4) To guard the public health[.]") The government is also empowered to abate conditions in buildings and on land that it determines are harmful to public health: the "existence on any lot or parcel of land * * * of * * * materials * * * of any kind * * * insofar as they affect the public health, comfort, safety, and welfare" is a public nuisance. Act of Mar. 1, 1899, § 2, 30 Stat. 923, *as amended,* D.C. Code § 5-604(a)(1988 repl.)

Besides the obligations imposed by local law, the District is treated as a state by national legislation and is obligated to inspect and abate asbestos in its public schools. See Pub. L. 94-469, Title II, 90 Stat. 2003, *as amended by* Pub. L. 99-519, 100 Stat. 2970, 15 U.S.C. 2641 *et seq.* (1988); Pub. L. 96-270, 94 Stat. 487, 20 U.S.C. 3601 *et seq.* (1988); Pub. L. 98-377, Title V, 98 Stat. 1287, 20 U.S.C. 4011 *et seq.* (1988).

U.S. 371, 382-386 (1933);[12] *Colgrove v. Battin*, 413 U.S. 149, 156-157 (1973). Courts in the District of Columbia have long adopted this principle as well. *Linkins v. Protestant Episcopal Cathedral Foundation*, 87 U.S. App. D.C. 351, 354-55, 187 F.2d 357, 360-61 (1950).

The precedential underpinnings of the Court's 1889 analysis in *Metropolitan Railroad* have eroded over the century, most notably by the Court's own more recent formulations of the *nullum tempus* doctrine. In the intervening century, the Court has focussed on the underlying purpose of the doctrine rather than on metaphysical attributes of sovereignty. In *Guaranty Trust Co. v. United States, supra*, 304 U.S. at 132, the Court emphasized that the policy of protecting the public from injury and loss, rather than antiquated concepts of "sovereignty," provides the basis for governmental immunity:

> Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitations it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king.

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[12] In *Funk*, the Court wrote:

> To concede this capacity for growth and change in the common law by drawing "its inspiration from every fountain of justice," and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a "flexibility and capacity for growth and adaptation" which was "the peculiar boast and excellence" of the system in the place of its origin.

290 U.S. at 383.

Id. at 132. Indeed, long before *Guaranty Trust*, the Court held that *non*-sovereign governments entrusted with broad grants of legislative authority are also *absolutely* immune from statutes of limitations. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (territory of Hawaii not subject to statutes of limitations).[13]

Unlike a century ago, most jurisdictions now hold that statutes of limitations do not apply to municipalities exercising governmental, as opposed to proprietary, functions.[14] Thus, not only does the uniformity of law that existed in 1889 no longer persist, general common law itself has evolved to the point where most jurisdictions now hold that municipalities performing uniquely public functions are immune from statutes of limitations.

The Court of Appeals has power to modify the common law. It is statutorily defined as "[t]he highest court of the District of Columbia." See n. 4, above, at 7. As such, it

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[13] The Court of Appeals' holding is consistent with the *Kawananakoa* reformulation of the *nullum tempus* doctrine for non-sovereign entities. In *Kawananakoa*, the Court distinguished the Territory of Hawaii from the District because Hawaii's organic act made the territory the principal lawmaker. By contrast, in the 1907 District, "the body of private rights is created and controlled by Congress and not by a legislature of the District." 205 U.S. at 354. Since 1973, however, the District's legislative powers have closely resembled those of 1907 Hawaii. *Compare* D.C. Home Rule Act, §§102(a), 302, Pub. L. 93-198, 87 Stat. 777 (1973), D.C. Code §§1-201, -204 (1987 repl.)(legislative power of the District extends "to all rightful subjects of legislation" with specified exceptions), *with* §55, Act of Apr. 30, 1900, 31 Stat. 141, 142, ch. 339. *See also In re Hooper's Estate*, 359 F.2d 569, 578 (3d Cir. 1966)(Virgin Islands not subject to statutes of limitations; while not sovereign, territory has attributes of autonomy similar to those of a sovereign; immunity is based on public policy articulated in *Guaranty Trust*).

[14] In addition to the decisions cited at A. 18a, n. 20, *see Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 601-603 (1989)(Chicago school district is not subject to statutes of limitations when suing to recover costs of removing asbestos from schools); *Oklahoma Municipal Improvement Authority v. HBT, Inc.*, 769 P.2d 131, 133-35 (Okla. 1989)(city agencies not bound by statutes of limitations when suing to recover costs incurred in repairing municipal water system).

is now the primary (if not exclusive) expositor of local common law and can legitimately take into account changes in decisional law around the country. In the present case, however, the Court of Appeals made no changes to prevailing law. Rather, it gave a full explanation of why it chose not to retreat from the decisional law adopted by the court almost twenty years ago in *District of Columbia v. Weis*, 263 A.2d 638, 639 (D.C. 1970), and thirty years ago in *Stonewall Construction Co. v. McLaughlin*, 151 A.2d 535, 536 (D.C. 1959). *See* A. 16a-17a.

In short, the decision is not foreclosed by *Metropolitan Railroad*; is consistent with this Court's decisions in this century; follows the prevailing view in jurisdictions throughout the United States; and reaffirms local common law as developed in recent decades.

3. The Court of Appeals' Decision on the Threshold Issue of the Manufacturers' Limitations Defense Does Not Violate Super. Ct. Civ. R. 56 or the Seventh Amendment.

The Court of Appeals' holding, that ridding public buildings of materials reasonably thought to endanger public health is a governmental function, is a legal conclusion that deprived the asbestos manufacturers of no rights under local rules of procedure or under the Constitution. The petition's arguments to the contrary (pet. at 17-19) are plainly frivolous.

a. In procedural terms, the Court of Appeals' holding is simply that partial summary judgment should not have been entered against the District. That interlocutory holding "decides only one thing—that the case should go to trial." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966).

b. The Court of Appeals' holding does not affect defenses other than the limitations defense or prevent a jury trial on any disputed factual issue. The Court of Appeals expressly held that its discussion of the potential dangers of asbestos

was solely "in support of our holding that the District has brought this lawsuit in the objectively good faith belief that it is necessary to vindicate a public right." A. 34a. Other than resolving the manufacturers' threshold limitations defense, all issues are "to be resolved at trial uninfluenced by anything that this court has stated in addressing the preliminary issue of the timeliness of the suit." *Id.*

c. The Court of Appeals' holding that removal of potential health hazards from schools, hospitals, libraries, prisons, and public housing is a public function is a legal conclusion, not a factual determination. *See, e.g., Rowan County Board of Education v. United States Gypsum Co.*, 87 N.C. App. 106, 359 S.E.2d 814, 819 (1987), *rev. denied*, 321 N.C. 298, 362 S.E.2d 782 (1987) (holding, on asbestos manufacturers' motion for summary judgment, that removal of asbestos as potential health hazard, is governmental function); *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 601-603 (1989)(same holding on motion to dismiss). The Court of Appeals' exploration of literature, case law, and federal laws and regulations (A. 6a-8a) was designed to assure itself that the District's claim that its actions furthered the public health had a rational foundation. At trial, of course, the District retains the burden of proof to show that the claimed danger to the public is real; petitioners are responsible for the danger; and the harm is compensable. In short, the manufacturers' procedural rights remain fully intact.

4. No "Vested" Rights Are Affected by the Court of Appeals' Holding.

The petition's contention that the Court of Appeals' adherence to its own decades-old precedent deprived the manufacurers of "vested" rights (pet. at 19) is also frivolous.

a. This Court has held that protections afforded by statutes of limitations are not normally vested rights. *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Chase Securities Corp. v.*

Donaldson, 325 U.S. 304, 313-316 (1945); *Campbell v. Holt*, 115 U.S. 620, 628-630 (1885).

b. Here, moreover, since at least 1970, in *Weis*, the Court of Appeals has held that the District was not subject to statutes of limitations when suing to protect the public health. *See* above, at 13. That decision was issued two years before enactment of D.C. Code § 12-310. Potential defendants were therefore on notice that D.C. Code § 12-310 might be construed as not applying to government litigation when the District was suing to vindicate public rights and that their ability to be free from suit might never "vest."

c. There is no basis for a doctrinal distinction between §§ 12-301 and -310 in the circumstances of this case, for reasons elaborated below. The statutes differ only by using different mechanisms for triggering the running of their time limits. In *Sandoe v. Lefta Associates*, 559 A.2d 732, 736 n. 5 (D.C. 1989), the Court of Appeals distinguished them by stating that time limits in § 12-301 are triggered by accrual of a cause of action while time limits in § 12-310 are triggered by events unrelated to the cause of action, such as completion of a building. The court called § 12-310 a "statute of repose." *Id.*

i. The Court of Appeals could reasonably hold that differences in the triggering mechanisms for starting the running of time do not determine whether government is to be subject to time limits when suing in the public interest. *See Bellevue School District v. Brazier Construction Co.*, 103 Wash. 2d 111, 691 P.2d 178, 183-84 (1984)(no reason to treat statutes of repose [such as § 12-310] differently from statutes of limitations in *nullum tempus* analysis); *Regents v. Hartford Accident & Indemnity Co.*, 21 Cal. 3d 624, 147 Cal. Rptr. 486, 495-96, 581 P.2d 197, 206-207 (1978)(no significant distinctions should be made between statutes of limitations and repose).

ii. Although the manufacturers assert that § 12-310 creates a "substantive" right, the "procedural"-"substantive"

dichotomy for time limits has been largely discounted in this Court's modern jurisprudence: "Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean is * * * largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co. v. Wortman, supra,* 486 U.S. at 726 (Full Faith and Credit and Due Process Clauses do not require forum state to apply other states' time limits); *Wells v. Simonds Abrasive Co.,* 345 U.S. 514, 516-518 (1953)(forum may treat "substantive" time limits of other states as "procedural"); *see also Beard v. J.I. Case Co.,* 823 F.2d 1095 (7th Cir. 1987)(refusing to apply expired Tennessee statute of repose in diversity suit brought in Wisconsin); *Wesley Theological Seminary v. U.S. Gypsum Co.,* 277 U.S. App. D.C. 360, 363-364, 876 F.2d 119, 122-123 (1989), *cert. denied,* 58 U.S.L.W. 3545, 108 L. Ed. 2d 473, 110 S. Ct. 1296 (1989) (upholding constitutionality of D.C. Law 6-202; distinction between statutes of limitations and statutes of repose is "somewhat metaphysical").

iii. In particular, there is no principled doctrinal basis for distinguishing time limits in statutes of repose from time limits in statutes of limitations when, as here, the government's cause of action actually accrued within the time limits of the statute of repose but the injury was first discovered after the time period had expired. Because asbestos is inherently dangerous, the District's cause of action against the manufacturers accrued as soon as their products were installed in government-owned buildings. In other words, the wrong was committed and the injury occurred upon installation, well within the ten-year time limit specified by D.C. Code § 12-310. The District did not sue at that time, however, because it had discovered neither the wrong nor its injury.[15]

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[15] In the District of Columbia, the discovery rule normally tolls statutes of limitations until the wrong or injury is discovered. *Bussineau v. President, etc., of Georgetown College,* 518 A.2d 423, 425, 428 (D.C. 1986).

When injury occurs (and a cause of action accrues) within the limits set by a statute of repose but is discovered later, its time limits do not apply to the government. In *Oklahoma City Municipal Improvement Authority v. HBT, Inc., supra*, 769 P.2d at 131, the court held that the statute of repose did not apply to a municipal agency suing to recover damages caused by negligent design of part of a municipal water system. Noting that the design failure had occurred within the time limits of the statute of repose, the court wrote (*id.*, at 137):

> [S]ince plaintiffs' initial right of action accrued and vested within the prescribed time period, the statute governs in this case not the substantive issue of the existence of a right, but the procedural aspect of the availability of a remedy. Once a cause of action arises, applicable statutes of limitation begin to operate placing a limit on the plaintiff's availability of remedy. Since plaintiff[']s initial cause of action arose and vested during the ten year period prescribed by [the repose] law, public policy compels us to adhere to the general rule that public rights should not be prejudiced by the tardiness of officials to whom those rights are entrusted.

The government's immunity from time limits is designed to safeguard "public rights, revenues, and property from injury or loss, by the negligence of public officers." *Guaranty Trust Co. v. United States, supra*, 304 U.S. at 132, and *United States v. Hoar, supra*, 26 Fed. Cas. at 330. That purpose is furthered by the Court of Appeals' holding that the time limit in a statute of repose does not apply to the government, suing in the public's interest, when, as here, timely suit is thwarted only because information about a public health hazard has been deliberately and conspiratorially withheld from the government and the public.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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AUGUST, 1990

the public interest and public fisc from the negligence of the government's agents." *Id.*

The Court of Appeals noted that the District was not claiming to be sovereign or quasi-sovereign but to be exempt from statutes of limitations "solely in connection with public functions delegated to it * * *." A. 16a. Not only was such immunity not foreclosed by *Metropolitan Railroad,* A. 15a-16a, it was now the rule rather than the exception that "when a municipality performs a public function, it enjoys legal immunity from the running of time." A. 18a-19a & nn. 20 & 22, *citing* to decisions in nineteen jurisdictions and to 17 E. McQuillin, MUNICIPAL CORPORATIONS (1982 & 1988 supp.) § 49.06. As a result, the Court of Appeals concluded, "we * * * hold that in its municipal capacity, the District enjoys a common-law immunity" from statutes of limitations. A. 20a.

The court denied rehearing *en banc,* no judge having called for a vote on the manufacturers' petition. A. 34a.[3]

REASONS FOR DENYING THE WRIT

1. There Is No Significant Federal Interest in the Court of Appeals' Interlocutory Decision.

This Court does not generally review District of Columbia decisions that have a purely local effect and touch no federal interest: "This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *Pernell v. Southall Realty,* 416 U.S. 363, 366 (1974); *see also Griffin v. United States,* 336 U.S. 704, 716-717, 719 (1949)(principle applied to criminal cases under the D.C. Code prosecuted in the name of the United States); *Key v. Doyle,* 434 U.S. 59 (1977)(dismissing appeal, under

[3] The hearing panel amended its opinion to add a note that the opinion was restricted to the "preliminary issue of the timeliness of the suit." A. 34a. *See* discussion, below, at 13-14.

former 28 U.S.C. 1257(1), from holding that local congressional statute was unconstitutional and denying certiorari; local statute enacted by Congress but limited to the District is not a "statute of the United States").

Although the Court has noted that its deference to the Court of Appeals as "the highest court" of the District[4] is a matter of policy rather than power, *Whalen v. United States*, 445 U.S. 684, 687 (1980), there is no reason for deviating from that policy here.[5] The statutes of limitations and the District's immunities are matters of purely local law. Other jurisdictions are wholly unaffected by the Court of Appeals' holding. No nonfrivolous constitutional issues are at stake. *See, generally, Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988)(Kansas' application of its statute of limitations to claims governed by the substantive law of other states does not implicate Full Faith and Credit or Due Process Clauses). Even as a local matter, the Court of Appeals' decision has little or no relevance beyond the present litigation in light of enactment of D.C. Law 6-202.[6]

2. The Court of Appeals' Decision Is Not Foreclosed By *Metropolitan Railroad* and Is a Reasonable Expression of the District of Columbia's Common Law.

Metropolitan Railroad is not a bar to refinements in the common law.

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[4] Act of Jul. 29, 1970, Pub. L. 91-358, 84 Stat. 475, § 111, D.C. Code § 11-102 (1989 repl.)("The highest court of the District of Columbia is the District of Columbia Court of Appeals. * * *").

[5] In *Whalen*, the Court deviated from its normal policy because the petition's constitutional claim "cannot be separated entirely from a resolution of the question of statutory construction." 445 U.S. at 688.

[6] The Court's normal deference to Court of Appeals' constructions of local law should have added force here, where the Court of Appeals' decision originates in an interlocutory appeal; raises no federal issues; and

(Footnote 6 continued on next page)

a. In *Metropolitan Railroad,* the Court, applying its understanding of common law prevailing a century ago, held that the District would not ordinarily be immune from statutes of limitations because it lacked sovereignty. In reaching that conclusion, the Court applied the common law doctrine, *nullum tempus,*[7] as it existed a century ago. Required to entertain direct appeals from the local court on purely local questions, the Court was necessarily the final expositor of local common law.[8] When the Court decided *Metropolitan Railroad,* therefore, it examined treatises and decisions describing the common law in other jurisdictions. *See* 132 U.S. at 11. Based on its survey of prevailing nineteenth-century jurisprudence, the Court concluded that, because municipalities were not sovereign, they were not qenerally immune from statutes of limitations.

Even at the time, however, the restriction of the immunity to sovereign governments was being questioned. One of the treatises on which the Court relied noted that some jurisdictions had held that "the maxim *[n]ullum tempus occurrit regi* is not restricted in its applications to sovereignty, but that it applies to municipal corporations as trustees

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(Footnote 6 continued)

can be reviewed after final judgment. *Pennsylvania v. Ritchie,* 480 U.S. 39, 47 (1987)(normally, "finality" requirement of 28 U.S.C. 1257 (1982) is not satisfied if state courts must conduct further substantive proceedings); *Market Street R. Co. v. Railroad Commission of California,* 324 U.S. 548, 551 (1945)(same).

[7] See 10 W. Holdsworth HISTORY OF ENGLISH LAW (1938) 355.

[8] When *Metropolitan Railroad* was decided a century ago, the Court had no power to select among District of Columbia decisions. The Supreme Court of the District of Columbia was a federal court with the "same powers and jurisdiction as the circuit courts of the United States." Rev. Stat., D.C., § 760 (1875). This Court was obligated to review all circuit court and local court decisions over a specified jurisdictional amount. Rev. Stat. § 692 (1878); Rev. Stat., D.C., § 846 (1875). In 1889, the jurisdictional amount for Supreme Court of the District of Columbia cases was $5000. Act of Mar. 3, 1885, 23 Stat. 443, ch. 355. *Metropolitan Railroad* required construction of a Maryland statute. *See* 132 U.S. at 11, *construing* 1 Kilty, Laws, 1715, ch. 23.

of the rights of the public." 2 J.F. Dillon, LAW OF MUNICIPAL CORPORATIONS (1881) § 674 at 672.[9]

Aware of this precedent, the *Metropolitan Railroad* Court expressly declined to decide whether a limitations defense could be asserted against the District if it were suing in furtherance of certain governmental functions, such as control of public property for public purposes and abatement of public nuisances. *Metropolitan Railroad*, 132 U.S. at 11, *quoted* at A. 16a. *Metropolitan Railroad* thereby suggested that, while the District would not be immune from general statutes of limitations because of the District's status as a non-sovereign municipality, it might be immune when performing *functions* peculiar to government. *Id.*[10]

Protection of the public health is a quintessential government function, especially in public buildings such as schools, hospitals, libraries, prisons, and public housing.[11] The District

[9] Judge Dillon also wrote: "The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle." 2 J.F. Dillon, LAW OF MUNICIPAL CORPORATIONS (1881) § 675 at 674.

[10] The petition argues (at 15) that Congress never gave the District general immunity from statutes of limitations. That is true; it simply means that Congress was content with letting judicial interpretations fill *Metropolitan Railroad*'s gaps. The petition's citation to D.C. Code § 12-308 (1989 repl.), which gives the United States immunity from local congressional statutes of limitations, adds nothing to the argument. Congress clearly can make the United States subject to congressional statutes of limitations, *see* 28 U.S.C. 2415 (1982); *United States v. John Hancock Mutual Life Insurance Co.*, 364 U.S. 301, 306 (1960). It is therefore likely that § 12-308, was designed to safeguard the United States' ability—under all circumstances—to sue without regard to congressionally-enacted local statutes of limitations. By contrast, Congress apparently preferred to leave the District's immunity to line-drawing by the judiciary, depending on the nature of the suit. When Congress expressly wished to prevent statutes of limitations from applying to the District because the governmental activity appeared to be *proprietary*, it legislated. *See* D.C. Code §§ 7-515 and -1415 (1989 repl.)(no limitations apply to District's efforts to obtain reimbursement from railroads for District-built rail crossings).

[11] The District government has long been delegated a general duty by Congress to protect the public health in the District, Rev. Stat., D.C., § 335,

(Footnote 11 continued on next page)

here sued to remove noxious impediments to unhampered public use of public property. Government litigation to recover full use of public property falls within the ambit of the issue deliberately left open by *Metropolitan Railroad*. *Id.*

Given *Metropolitan Railroad*'s refusal to decide whether the District can be immune from local statutes of limitations under all circumstances, the Court of Appeals looked at modern common law developments and concluded that it would be irrational to subject the District to general statutes of limitations when the District is acting in the role peculiar to representative government—protection of the public interest. A. 21a. Since the District has been given full responsibility for protecting the public health and safety of its citizens, "to hold that legal immunity resides in the actor rather than the act would divorce the principle from its purpose. It would expose the citizenry of the District, unlike the citizens of any other United States jurisdiction, to hazard without redress." *Id.*

b. This Court recognizes that the common law is not frozen in time, but is an evolving body of law, to be adapted to changed conditions and times. *Funk v. United States*, 290

(Footnote 11 continued

D.C. Code § 4-115 (1988 repl.)("It shall be the duty of the Mayor * * * at all times of the day or night * * * (4) To guard the public health[.]") The government is also empowered to abate conditions in buildings and on land that it determines are harmful to public health: the "existence on any lot or parcel of land * * * of * * * materials * * * of any kind * * * insofar as they affect the public health, comfort, safety, and welfare" is a public nuisance. Act of Mar. 1, 1899, § 2, 30 Stat. 923, *as amended*, D.C. Code § 5-604(a)(1988 repl.)

Besides the obligations imposed by local law, the District is treated as a state by national legislation and is obligated to inspect and abate asbestos in its public schools. See Pub. L. 94-469, Title II, 90 Stat. 2003, *as amended by* Pub. L. 99-519, 100 Stat. 2970, 15 U.S.C. 2641 *et seq.* (1988); Pub. L. 96-270, 94 Stat. 487, 20 U.S.C. 3601 *et seq.* (1988); Pub. L. 98-377, Title V, 98 Stat. 1287, 20 U.S.C. 4011 *et seq.* (1988).

U.S. 371, 382-386 (1933);[12] *Colgrove v. Battin*, 413 U.S. 149, 156-157 (1973). Courts in the District of Columbia have long adopted this principle as well. *Linkins v. Protestant Episcopal Cathedral Foundation*, 87 U.S. App. D.C. 351, 354-55, 187 F.2d 357, 360-61 (1950).

The precedential underpinnings of the Court's 1889 analysis in *Metropolitan Railroad* have eroded over the century, most notably by the Court's own more recent formulations of the *nullum tempus* doctrine. In the intervening century, the Court has focussed on the underlying purpose of the doctrine rather than on metaphysical attributes of sovereignty. In *Guaranty Trust Co. v. United States, supra*, 304 U.S. at 132, the Court emphasized that the policy of protecting the public from injury and loss, rather than antiquated concepts of "sovereignty," provides the basis for governmental immunity:

> Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitations it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king.

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[12] In *Funk*, the Court wrote:

> To concede this capacity for growth and change in the common law by drawing "its inspiration from every fountain of justice," and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a "flexibility and capacity for growth and adaptation" which was "the peculiar boast and excellence" of the system in the place of its origin.

290 U.S. at 383.

Id. at 132. Indeed, long before *Guaranty Trust*, the Court held that *non*-sovereign governments entrusted with broad grants of legislative authority are also *absolutely* immune from statutes of limitations. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (territory of Hawaii not subject to statutes of limitations).[13]

Unlike a century ago, most jurisdictions now hold that statutes of limitations do not apply to municipalities exercising governmental, as opposed to proprietary, functions.[14] Thus, not only does the uniformity of law that existed in 1889 no longer persist, general common law itself has evolved to the point where most jurisdictions now hold that municipalities performing uniquely public functions are immune from statutes of limitations.

The Court of Appeals has power to modify the common law. It is statutorily defined as "[t]he highest court of the District of Columbia." See n. 4, above, at 7. As such, it

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[13] The Court of Appeals' holding is consistent with the *Kawananakoa* reformulation of the *nullum tempus* doctrine for non-sovereign entities. In *Kawananakoa*, the Court distinguished the Territory of Hawaii from the District because Hawaii's organic act made the territory the principal lawmaker. By contrast, in the 1907 District, "the body of private rights is created and controlled by Congress and not by a legislature of the District." 205 U.S. at 354. Since 1973, however, the District's legislative powers have closely resembled those of 1907 Hawaii. *Compare* D.C. Home Rule Act, §§102(a), 302, Pub. L. 93-198, 87 Stat. 777 (1973), D.C. Code §§1-201, -204 (1987 repl.)(legislative power of the District extends "to all rightful subjects of legislation" with specified exceptions), *with* §55, Act of Apr. 30, 1900, 31 Stat. 141, 142, ch. 339. *See also In re Hooper's Estate*, 359 F.2d 569, 578 (3d Cir. 1966)(Virgin Islands not subject to statutes of limitations; while not sovereign, territory has attributes of autonomy similar to those of a sovereign; immunity is based on public policy articulated in *Guaranty Trust*).

[14] In addition to the decisions cited at A. 18a, n. 20, *see Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 601-603 (1989)(Chicago school district is not subject to statutes of limitations when suing to recover costs of removing asbestos from schools); *Oklahoma Municipal Improvement Authority v. HBT, Inc.*, 769 P.2d 131, 133-35 (Okla. 1989)(city agencies not bound by statutes of limitations when suing to recover costs incurred in repairing municipal water system).

is now the primary (if not exclusive) expositor of local common law and can legitimately take into account changes in decisional law around the country. In the present case, however, the Court of Appeals made no changes to prevailing law. Rather, it gave a full explanation of why it chose not to retreat from the decisional law adopted by the court almost twenty years ago in *District of Columbia v. Weis*, 263 A.2d 638, 639 (D.C. 1970), and thirty years ago in *Stonewall Construction Co. v. McLaughlin*, 151 A.2d 535, 536 (D.C. 1959). *See* A. 16a-17a.

In short, the decision is not foreclosed by *Metropolitan Railroad*; is consistent with this Court's decisions in this century; follows the prevailing view in jurisdictions throughout the United States; and reaffirms local common law as developed in recent decades.

3. The Court of Appeals' Decision on the Threshold Issue of the Manufacturers' Limitations Defense Does Not Violate Super. Ct. Civ. R. 56 or the Seventh Amendment.

The Court of Appeals' holding, that ridding public buildings of materials reasonably thought to endanger public health is a governmental function, is a legal conclusion that deprived the asbestos manufacturers of no rights under local rules of procedure or under the Constitution. The petition's arguments to the contrary (pet. at 17-19) are plainly frivolous.

a. In procedural terms, the Court of Appeals' holding is simply that partial summary judgment should not have been entered against the District. That interlocutory holding "decides only one thing—that the case should go to trial." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966).

b. The Court of Appeals' holding does not affect defenses other than the limitations defense or prevent a jury trial on any disputed factual issue. The Court of Appeals expressly held that its discussion of the potential dangers of asbestos

was solely "in support of our holding that the District has brought this lawsuit in the objectively good faith belief that it is necessary to vindicate a public right." A. 34a. Other than resolving the manufacturers' threshold limitations defense, all issues are "to be resolved at trial uninfluenced by anything that this court has stated in addressing the preliminary issue of the timeliness of the suit." *Id.*

c. The Court of Appeals' holding that removal of potential health hazards from schools, hospitals, libraries, prisons, and public housing is a public function is a legal conclusion, not a factual determination. *See, e.g., Rowan County Board of Education v. United States Gypsum Co.*, 87 N.C. App. 106, 359 S.E.2d 814, 819 (1987), *rev. denied*, 321 N.C. 298, 362 S.E.2d 782 (1987) (holding, on asbestos manufacturers' motion for summary judgment, that removal of asbestos as potential health hazard, is governmental function); *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 601-603 (1989)(same holding on motion to dismiss). The Court of Appeals' exploration of literature, case law, and federal laws and regulations (A. 6a-8a) was designed to assure itself that the District's claim that its actions furthered the public health had a rational foundation. At trial, of course, the District retains the burden of proof to show that the claimed danger to the public is real; petitioners are responsible for the danger; and the harm is compensable. In short, the manufacturers' procedural rights remain fully intact.

4. No "Vested" Rights Are Affected by the Court of Appeals' Holding.

The petition's contention that the Court of Appeals' adherence to its own decades-old precedent deprived the manufacurers of "vested" rights (pet. at 19) is also frivolous.

a. This Court has held that protections afforded by statutes of limitations are not normally vested rights. *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Chase Securities Corp. v.*

Donaldson, 325 U.S. 304, 313-316 (1945); *Campbell v. Holt*, 115 U.S. 620, 628-630 (1885).

b. Here, moreover, since at least 1970, in *Weis*, the Court of Appeals has held that the District was not subject to statutes of limitations when suing to protect the public health. *See* above, at 13. That decision was issued two years before enactment of D.C. Code § 12-310. Potential defendants were therefore on notice that D.C. Code § 12-310 might be construed as not applying to government litigation when the District was suing to vindicate public rights and that their ability to be free from suit might never "vest."

c. There is no basis for a doctrinal distinction between §§ 12-301 and -310 in the circumstances of this case, for reasons elaborated below. The statutes differ only by using different mechanisms for triggering the running of their time limits. In *Sandoe v. Lefta Associates*, 559 A.2d 732, 736 n. 5 (D.C. 1989), the Court of Appeals distinguished them by stating that time limits in § 12-301 are triggered by accrual of a cause of action while time limits in § 12-310 are triggered by events unrelated to the cause of action, such as completion of a building. The court called § 12-310 a "statute of repose." *Id.*

i. The Court of Appeals could reasonably hold that differences in the triggering mechanisms for starting the running of time do not determine whether government is to be subject to time limits when suing in the public interest. *See Bellevue School District v. Brazier Construction Co.*, 103 Wash. 2d 111, 691 P.2d 178, 183-84 (1984)(no reason to treat statutes of repose [such as § 12-310] differently from statutes of limitations in *nullum tempus* analysis); *Regents v. Hartford Accident & Indemnity Co.*, 21 Cal. 3d 624, 147 Cal. Rptr. 486, 495-96, 581 P.2d 197, 206-207 (1978)(no significant distinctions should be made between statutes of limitations and repose).

ii. Although the manufacturers assert that § 12-310 creates a "substantive" right, the "procedural"-"substantive"

dichotomy for time limits has been largely discounted in this Court's modern jurisprudence: "Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean is * * * largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co. v. Wortman, supra*, 486 U.S. at 726 (Full Faith and Credit and Due Process Clauses do not require forum state to apply other states' time limits); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516-518 (1953)(forum may treat "substantive" time limits of other states as "procedural"); *see also Beard v. J.I. Case Co.*, 823 F.2d 1095 (7th Cir. 1987)(refusing to apply expired Tennessee statute of repose in diversity suit brought in Wisconsin); *Wesley Theological Seminary v. U.S. Gypsum Co.*, 277 U.S. App. D.C. 360, 363-364, 876 F.2d 119, 122-123 (1989), *cert. denied*, 58 U.S.L.W. 3545, 108 L. Ed. 2d 473, 110 S. Ct. 1296 (1989) (upholding constitutionality of D.C. Law 6-202; distinction between statutes of limitations and statutes of repose is "somewhat metaphysical").

iii. In particular, there is no principled doctrinal basis for distinguishing time limits in statutes of repose from time limits in statutes of limitations when, as here, the government's cause of action actually accrued within the time limits of the statute of repose but the injury was first discovered after the time period had expired. Because asbestos is inherently dangerous, the District's cause of action against the manufacturers accrued as soon as their products were installed in government-owned buildings. In other words, the wrong was committed and the injury occurred upon installation, well within the ten-year time limit specified by D.C. Code § 12-310. The District did not sue at that time, however, because it had discovered neither the wrong nor its injury.[15]

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[15] In the District of Columbia, the discovery rule normally tolls statutes of limitations until the wrong or injury is discovered. *Bussineau v. President, etc., of Georgetown College*, 518 A.2d 423, 425, 428 (D.C. 1986).

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